IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.580 OF 2005.

Kasam Ali Momin : Appellant.

versus

The Municipal Corporation of Gr. Bombay & ors. : Respondents.

Mr.M.U.Pandey for the appellant.

Mr.J.J.Xavier for the respondent/BMC

CORAM : D.G.DESHPANDE,J.

DATED : 14th September 2005.

ORAL ORDER

1. Heard the advocates for the appellant and Respondent/BMC. Appellant is the original plaintiff. He filed a suit against the Bombay Municipal Corporation and later on joined the owner of the property as defendant No.2 which is a Trust. It was his case that he is the tenant of Defendant No.2 in respect of open land

admeasuring 1118 sq.ft since 1969 and this land was given to the plaintiff with a right to put up a construction thereon as per the rent receipt dated 13/5/1969 which is at Exhibit "A" to the plaint. Then the plaintiff constructed ground plus two upper floors. They are their since 1981. According to the plaintiff, a fire broke out in the suit premises and the adjoining premises on 25/8/99 where the 2nd floor was affected along with the loft. The officer of the BMC came to the site, prepared inspection note and observed that no major damage was caused to the structure. Thereafter notice under section 354A of the BMC Act was given about the unauthorised reconstruction of the structure. The plaintiff got this notice on 1st September 1999. Then he gave reply to the said notice on 5th September 1999. Thereafter the BMC served a notice under section 351 of the BMC Act on 6th October 1999. The plaintiff also gave notice on 11th October 1999. Order rejecting the plaintiff’s case came to be passed by the BMC on 3rd December 1999 and, the ground of rejection was that the plaintiff has failed to produce documentary evidence to show that the structure was prior to the datum line of 1st April 1962.

Therefore, the plaintiff filed the suit challenging the said notice and the order of the BMC and prayed therein for declaration that the order and notice are illegal and, for consequential relief of injunction restraining the defendant from demolishing the structure which the plaintiff refers to as Shed bearing Shed No.180.

2. This claim and contention of the plaintiff was opposed by the BMC on the ground that the datum line, even for this structure in the Bombay Compound, was never changed from 1962 to 1981 as is alleged by the plaintiff in his detailed pleadings. According to the BMC, the datum line remained the same and there is no proof with the plaintiff to show that the corporation has ever changed its policy. The BMC did not file its written statement. But the defendant NO.2-trust contested the plaintiff's claim by filing its written statement. Their contention was that the plaintiff was never given open land on lease for construction of shed but Shed No.180 consisting of ground floor only was given to the plaintiff on rent. But the plaintiff made unauthorised construction under

the guise of repairs to the portion of the shed which was partially damaged in the fire broken out in the year 1989. According to trust, the shed was initially admeasuring 450 sq.ft. only but the plaintiff constructed ground plus two upper floors illegally, without permission, consent and approval of the trust and without getting any map sanctioned from the BMC or without the permission of the BMC.

3. The trial court on the basis of these pleadings framed six issued, required the parties to adduce evidence and then ultimately dismissed the suit of the plaintiff. Hence this appeal.

4. Counsel for the plaintiff repeatedly tried to urged that the datum line for construction in the Bombay Compound is 1981 and since the structure of the plaintiff was prior thereto, it was not liable to be demolished. My attention was invited by the learned counsel for the plaintiff to the different documents, correspondence to substantiate his contention about the change of datum line and also to the evidence. Further thrtr are three crucial questions in this matter. Firstly, whether the

plaintiff proves that he was given open land by the Trust with permission to make construction there upon ? And the answer is in the negative. This is not only the case of denial of the facts by the trust but also a case of absence of any documentary evidence to support the contentions of the plaintiff. As per the plaint, the plaintiff relied on Exhibit A - the rent receipt in this connection. That rent receipt is annexed with the memo of appeal i.e. in the documents supplied and the said receipt is as under :-

> "Received from Messrs Kasam Ali Momin a sum of Rupees Eight hundred Ten only by Cheque No.0158043 being the Deposit Rent period from _____ to _____ as per agreement dated _____ for Shed NO.80 at B.J.Malal."

This receipt does not prove the claim and contention of the plaintiff that he was granted open land on lease with permission to erect the structure. No trust would ordinarily part with the land in such a casual manner and, the plaintiff has no document to support his contention. The plaintiff has measurably failed

to prove that he has a right, authority and permission from the trust to make any construction.

5. The 2nd aspect of the matter is, whether the datum line was changed from 1962 to 1981 by the BMC in respect of the Bombay Compound or the structure in Bombay Compound. All the correspondence, documents relied upon by the plaintiff have been properly considered by the trial court. In order to prove that the datum line has been changed by the corporation, it was obligatory upon the plaintiff to produce notice before the corporation in this regard. The plaintiff has measurably failed to prove this important and vital aspect because **it is a matter** of policy and an officer admission cannot change the policy of the corporation. The policy decision has to be taken as per the provision of BMC Act. The plaintiff has nothing with him to show in this regard. Therefore, his contention is required to be rejected.

6. In the Schedule below in the notice under section 351 dated 6th October 1999 it is

mentioned that "unauthorised construction of 1st floor having M.S.plate flooring rested on M.S. girders and G.I. sheet side walls with A.C. sheet roof. Details as shown in the sketch." Counsel for the BMC has shown me photographs during the course of arguments and, it is clear from those photographs that it was totally huge new construction by the plaintiff under the guise of repairs to the portion burned out to fire. In fact the Commissioner was appointed by the court and the commissioner has filed his report which clearly falsifies the claim and contention of the plaintiff that he was merely repairing the structure which was affected by fire. Therefore, the findings of the trial court on all the issues framed are correct and proper. It is necessary to mention that before issuing notice under section 351, a stop work notice was issued, but the plaintiff did not stop the work. From the submissions made by the respondents/trust it is clear that the construction of the plaintiff is absolutely illegal, without permission and authority and, therefore, in this circumstances the claim and contention of the plaintiff is required to be rejected. Hence the Appeal is dismissed with costs. Stay to continue for six

weeks.

[D.G.DESHPANDE,J]